

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF THE STATE OF NEW YORK

BH SEVEN, LLC.,	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO. 1:11-cv-02483
	§	
AMBIT ENERGY, L.P.,	§	
JERE W. THOMPSON, JR., AND	§	
CHRIS CHAMBLESS,	§	
	§	
Defendants.	§	
	§	

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DECLARATION OF STEPHEN C. RASCH

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1. My name is Stephen C. Rasch. All the facts set forth in this Declaration are within my personal knowledge and are true and correct.
2. I am an attorney at Thompson & Knight LLP, and I represent Defendants Ambit Energy, L.P., Jere W. Thompson, Jr., and Chris Chambless in this action.
3. Attached to this Declaration are true and correct copies of the transcripts of the Pre-Motion Conference telephone hearings, dated June 30, 2011 and August 26, 2011 that our firm received from the official reporter of the court.
4. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on October 18, 2011.

  
\_\_\_\_\_  
STEPHEN C. RASCH

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# JUNE TRANSCRIPT

TRANSCRIPT  
JUNE 30, 2011

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X		
NICOLE GUBIN AND BH SEVEN, LLC,	:	11-CV-2483 (ARR)
	:	
Plaintiffs,	:	
	:	United States Courthouse
-against-	:	Brooklyn, New York
	:	
	:	Thursday, June 30, 2011
	:	4:00
AMBIT NEW YORK, LLC, AMBIT ENERGY FUNDING, LLC, AMBIT HOLDINGS, LLC, ET AL,	:	
	:	
Defendants.	:	
- - - - - X		

TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE  
BEFORE THE HONORABLE ALLYNE R. ROSS  
UNITED STATES SENIOR DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs:	LAW OFFICE OF FLORA RAINER, ESQ. Attorney for the Plaintiffs - Nicole Gubin and BH Seven, LLC 7234 73rd Street Glendale, New York 11385 BY: FLORA RAINER, ESQ.
For the Defendants:	THOMPSON & KNIGHT, LLP Attorneys for the Defendants - Ambit New York, LLC, Ambit Energy Funding, LLC, Ambit Holdings, LLC, et al 919 Third Avenue 39th Floor New York, New York 10022 BY: GABRIELLE ELISE FARINA, ESQ.

A P P E A R A N C E S: (Continued.)

THOMPSON & KNIGHT, LLP  
Attorneys for the Defendants -  
Ambit New York, LLC, Ambit Energy  
Funding, LLC, Ambit Holdings, LLC, et  
al

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Proceedings recorded by computerized stenography. Transcript  
produced by Computer-aided Transcription.

Telephone Conference

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1 (The following takes place in judge's chambers.)

2 (Parties appear via telephone.)

3 MS. RAINER: Hello?

4 THE COURT: Hello? Ms. Rainer, are you on?

5 MS. RAINER: Yes.

6 THE COURT: Ms. Farina?

7 MS. FARINA: Yes.

8 THE COURT: And is it Mr. Rasch; is that correct?

9 MR. RASCH: It is, your Honor.

10 THE COURT: Okay. And is that everybody?

11 MR. RASCH: Yes, your Honor, on our side.

12 THE COURT: Okay, that's fine.

13 Let me tell you that I have a court reporter  
14 here who is taking the minutes of this proceeding and it  
15 would greatly facilitate a clear transcript if you would  
16 identify yourselves by name before you speak, all right?

17 I have read through the letters, plaintiff's  
18 complaint, obviously, some of the other matters that were  
19 presented last week and I've also read the attachment which  
20 is defendant's motion. I think we have some work to do in  
21 this case.

22 Ms. Rainer, let me say that I think the  
23 complaint presents a number of difficulties, one of which is  
24 that I've had a hard time deciphering it. But apart from  
25 that, it appears to be inadequate in a number of respects

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1 that I want to discuss with you because what I would like to  
2 do is give you an opportunity to replead your best and final  
3 complaint. I don't want to go through multiple motions with  
4 leaves to amend, I just want to do it once.

5 So, on the understanding that I am granting  
6 leave to amend right now, do you understand that this is the  
7 last time, this will be your raft pleading, right?

8 MS. RAINER: Your Honor, I understand. But I have  
9 a little bit of difficulty to consent that this would be a  
10 final. I would have liked to reserve my rights.

11 THE COURT: In terms of the sufficiency of the  
12 complaint, you know, it could be that if you go into  
13 discovery near the end of discovery, you may discovery that  
14 you had another cause of action to add to your complaint,  
15 I'm not talking about that. I'm talking about I don't want  
16 it go through multiple rounds of pleading and repleading  
17 just to get going.

18 MS. RAINER: I understand.

19 THE COURT: Okay. That's fine.

20 Let me talk first about jurisdiction. I  
21 think that the defendants have a valid point that insofar as  
22 you are seeking it, I don't know whether or not you are  
23 relying on diversity jurisdiction, but if you are, it is not  
24 sufficiently pleaded in this case. Obviously, you do have  
25 to look to each of the defendants individually and plead

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1 diversity individually. You have partnerships and LLCs and  
2 you don't know the citizenship of the members or partners.

3 So, if you want to plead diversity, you're  
4 just going to have to tease it all out and plead it.

5 Do you understand?

6 MS. RAINER: Yes.

7 THE COURT: There is a lot of case law in this  
8 district about how you go about doing that and it just has  
9 to be done, so.

10 Insofar as you are asserting federal claims,  
11 similarly to the defendant, I am assuming that you have made  
12 four different assertions. You have relied on the Federal  
13 Trade Commission Act, 15 U.S.C. Section 45(a). As far as I  
14 know, there is no private right of action.

15 Now, I would suggest that you look into that  
16 and if you're serious about that, then do something. But,  
17 if you're not satisfied that you have a good-faith basis to  
18 plead a private right of action under the Federal Trade  
19 Commission Act, I would strongly suggest that you not try  
20 to.

21 When you refer to the Natural Gas Act, are  
22 you talking about 15, United States Code, Section 717? What  
23 are you talking about?

24 MS. RAINER: I believe possibly, I don't have the  
25 whole file in front of me, I just took a break from a



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1 deposition to make this call and I don't have the file in  
2 front of me. I would have quoted it, I believe.

3 THE COURT: No, there is nothing quoted.

4 MS. RAINER: Okay.

5 THE COURT: There's not even a statute cited, so  
6 we tried to figure out what you meant.

7 Now, we thought maybe you meant 15,  
8 United States Code, Section 717. I don't know if that's  
9 what you intended, but even if you did, there's -- I don't  
10 believe there's a private right of action under that either  
11 so, I want you to look very carefully.

12 You're going to have to really dissect your  
13 pleading yourself and put it back together in a way that  
14 we'll be able to deal with it.

15 The third potential federal action is the  
16 RICO, that does not begin to plead a RICO. There is many,  
17 many things that must be plead in order to satisfy the RICO  
18 statute and that's something that you're going to have to  
19 look into independently.

20 There are some things that lead me to believe  
21 perhaps that you would never be able to plead a RICO, one of  
22 which is I don't think you can plead any RICO predicate.  
23 Somewhere else in your complaint, you refer to -- you don't  
24 directly refer to wire fraud as a RICO predicate, let me  
25 assume that that's what you intended. But you have to go to

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1 the RICO statute, you have to sufficiently plead facts that  
2 would support all of the elements of a RICO claim, and you  
3 would have to sufficiently plead if it's wire fraud or if  
4 it's mail fraud, whatever it is the elements of that.

5 One of the problems that I see with your  
6 pleading is that it seems that each claim of fraud is a  
7 claim that is intrinsic to the contract, not extrinsic to  
8 the contract and that will not be sufficient when  
9 essentially what you're saying is you were defrauded because  
10 somebody breached the contract in a certain way that's not a  
11 fraud, that's a breach of contract.

12 So, I think you're going to have to look very  
13 closely at that, too, because that would eliminate even  
14 common law fraud.

15 As to your employment discrimination,  
16 assuming it's a Title VII claim, you have actually, I mean,  
17 in my mind, your complaint pleads that you are a consultant  
18 which, by definition, is not an employee.

19 Now, I don't know whether you have facts that  
20 would establish that you are an employee as distinguished  
21 from an independent contractor but particularly, in light of  
22 the relationship as you've set it forth in the existing  
23 pleading, you're going to have to plead a sufficient factual  
24 basis to lead to the plausible conclusion that you may be an  
25 employee as distinguished from an independent contractor.

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1 But you have called the relationship, the  
2 relationship as one of a consultant and described it in a  
3 way that it's hard to imagine that either you, either  
4 Ms. Rubin or her corporation that she created, to do this is  
5 the employee of the defendant. So, that's another problem  
6 that I think you're going to have to address.

7 Let me ask you this, it's not even entirely  
8 clear what this contract is.

9 Is this an oral contract?

10 MS. FARINA: Hello.

11 THE COURT: Do we still have everybody?

12 MR. RASCH: Judge, this is Steve Rasch, I think  
13 that my colleague in New York, Gabrielle Farina, just  
14 dropped off. I know that was unintentional. We can  
15 continue the conference because I'm still on and hopefully  
16 Gabrielle can dial back in.

17 THE COURT: Ms. Rainer, is the contract a written  
18 contract or an oral contract?

19 MS. RAINER: It's a written contract. It's a  
20 written contract that's done online over the Internet.

21 THE COURT: Okay. But you can get a copy of that  
22 and attach that to your amended pleading, I assume?

23 MS. RAINER: Yes.

24 THE COURT: Okay. Well, I mean, assuming we get  
25 past all these other --

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1 MS. FARINA: I apologize, your Honor. I lost the  
2 call somehow.

3 THE COURT: I understand. I just -- the only  
4 thing that's gone on your absence is I ascertained from  
5 Ms. Rainer is that the contract is a written contract  
6 obtained from the Internet, it is not an oral contract and  
7 Ms. Rainer presumably, if there is a repleading, will be  
8 attaching that to the repleading so we will know what the  
9 contract is.

10 I guess that raises the question to me that  
11 defendants can answer is that the contract you were  
12 referring to when you said there was a forum selection  
13 clause?

14 MR. RASCH: Yes, your Honor there is a forum  
15 selection clause and there is also a mandatory arbitration  
16 clause.

17 And, your Honor, you may or may not want us  
18 to get into this at this point, but from our standpoint,  
19 there are many aspects of this pleading that I would  
20 characterize as reckless including the inclusion of a whole  
21 number of parties that couldn't have any conceivable  
22 connection to this case.

23 One example being the Trinity River  
24 Commission Foundation, Inc., which is a nonprofit  
25 organization that the president of Ambit served on a number

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1 of years ago. That has to do with a river that is located  
2 in the Dallas area that has no conceivable connection to  
3 Ambit or Ms. Rainer's client. And it appears to me that  
4 there was just a Google search done and any organization  
5 that showed Jerry Thompson was named in this complaint.

6 THE COURT: Ms. Rainer, let me simply say I don't  
7 know whether or not what Mr. Rasch has just said is  
8 perfectly accurate or not but I am asking that you will  
9 clean up this pleading in every way and take Rule 11  
10 seriously, okay? And that's both in terms of your causes of  
11 action, in terms of your defendant, in terms of your basis  
12 of jurisdiction, in terms of the facts supporting any claim  
13 that you make.

14 I am concerned, if you're relying on a  
15 contract that has an arbitration selection and a forum  
16 selection clause, that leads me to wonder honestly whether  
17 this is something you should seriously consider before you  
18 replead here or perhaps what you want to do is narrow your  
19 complaint down to whatever it really is and bring it in the  
20 appropriate forum to begin with so you don't end up doing  
21 unnecessary litigation in the Eastern District of New York.

22 I'm not asking you to answer any of these  
23 questions right now, I'm just putting all of them out there.  
24 It may be that what your lawsuit really is, is a limited  
25 one, doesn't have 12 causes of action, maybe it has one or

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1 two causes of action and there may be another place where  
2 you have to be, not here.

3 I am also concerned about your including  
4 defendants who have nothing to do with the case. And let me  
5 also say in addition to that, I mean, even the state law  
6 claims are insufficiently pleaded, all of them. The breach  
7 of contract, the fraud, the libel and slander.

8 What you really -- you ought to decide what  
9 your lawsuit is about or what your actual claim really is  
10 and decide where it ought to be brought. And you know, I  
11 leave you free to do whatever you deem to be appropriate  
12 there, obviously, but I am concerned. I mean, there could  
13 be repercussions if you don't do your very best to adhere to  
14 that.

15 In any event, beyond that, it's not clear to  
16 me what to say. I think you ought to start from scratch and  
17 just making it long won't do it. You've got to determine  
18 whether this court has jurisdiction and what the basis of  
19 that is and plead everything that needs to be pleaded to  
20 ensure that you're going to have jurisdiction in this court.  
21 You're going to need to be sure whether you're in the right  
22 forum because if, in fact, your contract is restricted by a  
23 forum selection clause and an arbitration clause, you're  
24 going to have a problem.

25 But if you are in the right forum, you're

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1 going to have to plead not only the jurisdictional bases but  
2 you're going to have to look at each cause of action you  
3 actually decide to assert, look at the elements of any one  
4 claim, be absolutely certain that you have factually pleaded  
5 the existence of each element.

6           You can't just plead a conclusory element,  
7 you have to plead the facts. I don't know if I've been  
8 clear or if you have any questions, but what I want you to  
9 do is just take some time and do it right or choose not to  
10 do it here, choose to do it another way.

11           Now, how long would you like to do that?

12           MS. RAINER: I am going away on vacation for the  
13 next two weeks, I would like until July 22nd.

14           THE COURT: That's fine. I'm going to give you as  
15 much time as you want because I think it's important for you  
16 to do this right. As far as I am concerned, this is the  
17 last pleading, you understand?

18           MS. RAINER: Yes, I understand.

19           THE COURT: Okay. Well, then, it is possible that  
20 you will be filing on or before July 22nd, or if you decide  
21 you're going to decide to do something different for  
22 whatever reason, and I really don't know the merits of  
23 anything at this point as everybody knows, but if you decide  
24 to do something different would you let us know sooner than  
25 that date that you would not be filing the suit.

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1 MS. RAINER: Or if I need an extension.

2 THE COURT: Or if you need an extension I will  
3 give you an extension.

4 MS. RAINER: Thank you, your Honor.

5 I did see the contract. I believe that there  
6 are issues that can, that will result in the staying in the  
7 Eastern District especially with the high-tech technology,  
8 how things are done through Internet, and I just believe  
9 that there are issues.

10 THE COURT: Well, let me simply say whatever those  
11 issues, I want you to be certain that you understand that it  
12 is your responsibility to research those issues and be sure  
13 that you have a clear legal argument before you do it, okay?

14 MS. RAINER: Yes.

15 THE COURT: All right. Then I'm going to  
16 anticipate that we'll get a pleading from you by July 22nd.  
17 If you need more time, let me know, I'm happy to give it to  
18 you. And if you choose not to do that, we will hear from  
19 you that you're not going to pursue it here but that you're  
20 going to pursue it elsewhere, okay?

21 MS. RAINER: Yes, your Honor.

22 THE COURT: Is there anything else?

23 MR. RASCH: Your Honor, may I raise one thing?

24 THE COURT: Yes.

25 MR. RASCH: Very shortly before this call began,



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1 we received an ECF notice of another pleading apparently  
2 filed by Ms. Rainer's and the ECF notice, the docket text  
3 says, "Motion for Order to Show Cause, motion for Temporary  
4 Restraining Order." It says, "Awaiting counsel to e-mail  
5 the document, too large to scan." I don't know what this  
6 pleading is.

7 THE COURT: Ms. Rainer's had filed a motion for a  
8 Temporary Restraining Order and a Preliminary Injunction on  
9 Friday which I denied so that's what that is.

10 MR. RASCH: I'm sorry, your Honor, a week last.

11 THE COURT: This past Friday.

12 MR. RASCH: Okay. We were never served with that.

13 THE COURT: I know, because it was ex parte. But  
14 it will be in the court file and I don't know quite what  
15 else to say. There's no reason for you not to have it but  
16 it was denied.

17 MR. RASCH: Sure, okay, your Honor. Just so I  
18 understand, there's nothing that we need to respond to at  
19 this point?

20 THE COURT: There is nothing you need to respond  
21 to at this point, we don't have a complaint.

22 MR. RASCH: I wanted to get that clarification  
23 just because we received ECF notices and we didn't know what  
24 it was.

25 THE COURT: I hadn't seen it but that's what it

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1 was. There was a TRO, and Motion For Preliminary Injunction  
2 filed and that was it. There was a handwritten notation on  
3 the motion that denied the motion.

4 MR. RASCH: Sure. Thank you, your Honor.

5 MS. RAINER: For some reason, I did not receive  
6 the notice for ECF, I'm not sure why. Maybe somehow I  
7 didn't see it.

8 THE COURT: I don't know, Ms. Rainer's, I haven't  
9 looked for it. If it came to Mr. Rasch, I'm not sure why it  
10 didn't come to you. I can look at the docket number right  
11 now and see if I see anything.

12 MR. RASCH: The notice, your Honor, of the filing  
13 of the motion came to us about three minutes before this  
14 call was scheduled to begin and I see now that while this  
15 call was in progress I did get the Court's order with the  
16 handwritten note. So, it literally came in the last few  
17 minutes.

18 THE COURT: So, I'm sure, Ms. Rainer's, that you  
19 got it, too, it just happened okay?

20 MS. RAINER: Okay.

21 THE COURT: If it's gotten to your adversary it  
22 should have gotten to you.

23 MS. RAINER: Okay.

24 THE COURT: And if you have any problem, call the  
25 clerk's office or whatever. But I'm assuming it's got to be

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1 on ECF.

2 MS. RAINER: Okay.

3 THE COURT: Okay.

4 All right. If no one has anything else,  
5 we'll leave it here. If, Ms. Rainer's or Mr. Rasch, if you  
6 want a copy of the minutes, I will put the court reporter  
7 on.

8 Does anybody want it at this point or are you  
9 going to order at a later time if you wish?

10 MR. RASCH: This is Steve Rasch.

11 We would like a copy of the minutes and we  
12 would like to take the opportunity to speak to the court  
13 reporter.

14 THE COURT: He will get all the information from  
15 you, okay?

16 MR. RASCH: Sure.

17 (WHEREUPON, the proceedings were adjourned.)

18

19 \* \* \*

20 CERTIFICATE OF REPORTER

21 I certify that the foregoing is a correct transcript of the  
22 record of proceedings in the above-entitled matter.

23

24

25 \_\_\_\_\_  
Anthony D. Frisolone, FAPR, RDR, CRR, CRI  
Official Court Reporter

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Anthony D. Frisolone, FAPR, RDR, CRR, CRI, CSR  
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# AUGUST TRANSCRIPT



TRANSCRIPT  
AUGUST 26, 2011

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

- - - - - X  
GUBIN, :  
Plaintiff, : 11-CV-2483  
-against- :  
United States Courthouse  
AMBIT ENERGY, L.P., et al, : Brooklyn, New York  
Defendants. :  
August 26, 2011  
- - - - - X 12:00 p.m.

TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE ALLYNE ROSS  
UNITED STATES DISTRICT SENIOR JUDGE

APPEARANCES:

For the Plaintiff: FLORA RAINER, ESQ.

For the Defendants: THOMPSON & KNIGHT, LLP  
BY: STEPHEN C. RASCH, ESQ  
MATTHEW M. MITZNER, ESQ.

Court Reporter: FREDERICK R. GUERINO, C.S.R.  
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Brooklyn, New York  
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Proceedings recorded by mechanical stenography, transcript  
produced by CAT.

FREDERICK R. GUERINO, C.S.R.

OFFICIAL COURT REPORTER

1           Gubin v. Ambit New York, et al.

2           (The following is a telephone conference in  
3 chambers.)

4           THE COURT: Ms. Rainer?

5           MS. RAINER: Yes

6           THE COURT: Hold on for one second and I will  
7 conference in your adversary, okay?

8           MS. RAINER: Okay. No problem.

9           THE COURT: Is this Steve Rasch?

10          MS. RASCH: Yes.

11          THE COURT: Hello, Mr. Rasch. I'm conferencing in  
12 Ms. Rainer. One second

13          MR. RASCH: Sure

14          THE COURT: Hello. So we have everybody. We have  
15 Ms. Rainer?

16          MS. RAINER: Yes. Can you hear me?

17          THE COURT: Very well.

18          MS. RAINER: Okay.

19          THE COURT: Mr. Rasch?

20          MR. RASCH: Yes, Your Honor. And I have Matthew  
21 Mitzner with my office here.

22          Would the Court mind if I put the Court on speaker?

23          THE COURT: No. Sometimes it makes it difficult,  
24 but I will try it. I may ask you to take it off because I'm  
25 on speaker.

1           MR. RASCH: Sure. If it is difficult to hear, I'm  
2 happy to pick up. Thank you.

3           THE COURT: We'll try it that way, though.

4           MR. RASCH: Sure.

5           THE COURT: Okay?

6           MR. RASCH: Yes, your Honor.

7           THE COURT: Okay.

8           I have had an opportunity to read the new complaint  
9 and the new letters. I've also done some more research.

10           Ms. Rainer, you know, I think there are things that  
11 you can do, so I'm going to give you one more chance. I've  
12 focused on every single cause of action, and I want to talk  
13 it through with you, and we'll talk it through with your  
14 adversary, but I do want you to understand, as I said the  
15 last time, that this is the last time. Okay?

16           MS. RAINER: Yes, I understand, your Honor. I'm  
17 trying to be as detailed as possible.

18           THE COURT: I understand, that's why I know you are  
19 trying, and that's why I went through - given the time  
20 limitations - as much of it with a fine-tooth comb as I  
21 could, and I'm prepared to state to you some of the problems  
22 that I see, some of which I think you can fix. Okay?

23           MS. RAINER: I appreciate that, your Honor.

24           THE COURT: Okay.

25           But you have to appreciate that your second amended

1 complaint is the last one. Okay?

2 MS. RAINER: I understand.

3 THE COURT: Okay.

4 Now, first of all, this is just a general question.  
5 The defendants claim entitlement to arbitration in Texas and  
6 the plaintiff takes the position that the agreement was oral  
7 and that she never signed an agreement.

8 Do the defendants have a signed agreement to  
9 continue an arbitration clause?

10 MR. RASCH: It is my understanding, your Honor, that  
11 the way these contracts work, they are executed on line. So  
12 there's a block the consultant checks indicating that they  
13 agreed to the terms of the contract, and also to the policy  
14 and procedures. So that's my understanding of the way it  
15 works.

16 MS. RAINER: That is not how my client finds out.  
17 They were one of the initial people. There was no on-line  
18 application. This was all done through the phone, just as I  
19 have stated.

20 THE COURT: Okay. So, you know, I gather that  
21 there's going to be a dispute about that. Obviously, if --  
22 this is a factual issue, and it could foreclose proceeding in  
23 this forum and require proceeding in another forum. I'm  
24 going forward because there's a factual dispute here, but I  
25 think it makes a great deal of sense for the defendant to be

1 absolutely certain of what you are assuming.

2 MR. RASCH: Your Honor --

3 THE COURT: If you don't have something that really  
4 is tantamount to a signed agreement, whatever that is, then  
5 there's no requirement to arbitrate. You know this as well  
6 as I do. I'm just saying there would be a huge duplication  
7 of effort here, and I leave that up to you. I'm not about to  
8 resolve it because it is a fact issue.

9 MR. RASCH: Judge, I'm not even understanding where  
10 the idea of where the oral contract comes in. As best as I  
11 can tell in the complaint is not clear on this point, but Ms.  
12 Rainer seems to indicate -- her client seems to indicate an  
13 oral consultant with --

14

15 MS. RAINER: Your Honor --

16 MR. RASCH: If I could speak for a second

17 I don't know how that person could bind Ambit  
18 Energy, if that person is an independent consultant. That  
19 person is not an agent of Ambit, and certainly in the  
20 principal agent relationship, it would have to be the  
21 principals that cloak the agent with some kind of parent  
22 authority. The agent, himself or herself, could not cloak  
23 himself or herself with that authority. So even if you take  
24 everything that Ms. Gubin is alleging at face value, it still  
25 doesn't rise to the level of creating a contract

1           THE COURT: Maybe there's no contract at all. I  
2 have no idea. This is something you can litigate

3           MR. RASCH: And, your Honor, the other thing is, the  
4 complaint still alleges generically that the 14 defendants  
5 breached the agreement. I mean, the complaint still has all  
6 kinds of problems in terms of figuring out what it is

7           THE COURT: That's not the end of my concerns

8           MR. RASCH: Sure

9           THE COURT: That was just the first question I  
10 decided to ask, okay.

11           MS. RAINER: Well, your Honor, if I may. I wanted  
12 to add one thing, so defense counsel understands this is what  
13 multilevel marketing is all about. It is about a consultant  
14 bringing in a consultant, and in this case there was no  
15 internet on-line application. It is all done -- the initial  
16 stages in my client's case, it was done by telephone.  
17 However, what happened to the other consultant is different.  
18 As I just said, I wanted to emphasize this is what multilevel  
19 marketing is all about.

20           THE COURT: Okay. But I think something that you  
21 have been put on notice, Ms. Rainer, if it was all done by  
22 telephone with another consultant, that could - and I have no  
23 idea - raise an issue as to whether the defendants are bound  
24 by the agreement of another consultant. In other words, the  
25 other consultant must have actual or parent authority.

1 MS. RAINER: What I was going to say, that  
2 consultant was on the phone to another consultant who has  
3 authority to Ambit.

4 THE COURT: Okay. This is all fact issues and this  
5 will all come out in discovery, once we get there, if we get  
6 there.

7 MS. RAINER: Clearly, your Honor, since 2007 there  
8 is something that caused the defendants to make payments to  
9 my client. If there is no binding, then payment would never  
10 have been made in 2007 either.

11 THE COURT: Ms. Rainer, I'm not deciding any of  
12 that. It is nothing that I'm even going to consider. It is  
13 not a question of the pleading or anything like that.

14 MS. RAINER: The only reason why I raise it as an  
15 issue is because the defendants are actually proceeding with  
16 the arbitration. They filed something with the AAA. Now, I  
17 received a letter from the arbitrator saying that we have 90  
18 days from August 8th to --.

19 THE COURT: Ms. Rainer, I'm sorry, I don't mean to  
20 interrupt you, but I can't do anything about the arbitration.

21 MS. RAINER: Okay. The arbitration is nothing I can  
22 do about. You will have to deal with the arbitration  
23 separately.

24 MS. RAINER: I understand.

25 THE COURT: I'm sorry, but I also apologize for



1 being so late. That's just part of the fact it's been a hard  
2 day.

3 Let me move on to jurisdiction.

4 You still, if you look at the statute, the statute  
5 doesn't require residence. It requires citizenship. So you  
6 have to plead citizenship of the parties, and you can fix  
7 that, I assume.

8 In addition to that, there is, as defendant has  
9 mentioned, a requirement that when you are talking about  
10 partnerships, LLCs and LLPs, you must plead the citizenship  
11 of all members.

12 Now, it is possible to read your letter as saying  
13 based on your research, your research discloses that the only  
14 member of all the defendants is Jere Johnson, and he's a  
15 citizen of Texas, then that's okay. But you still have to  
16 plead that at least on information and belief. You have to  
17 have a basis for it.

18 MS. RAINER: I understand, your Honor. Perhaps I  
19 think because I do more state work and when we talking about  
20 residency applies, I apologize.

21 THE COURT: That's all right. That's why I'm being  
22 specific.

23 Let me also ask Mr. Rasch, are any of the partners  
24 in the defendants New York citizens that you are aware of?

25 MR. RASCH: Well, your Honor, part of the problem is

1 that all of the parties are not properly identified, and it's  
2 been a real shotgun approach. Some of these entities that  
3 have been sued are not even necessarily affiliated in any way  
4 with my client. I think I mentioned to the Court in a  
5 previous call the problem that there was a non-profit entity  
6 that my client served on the board ten years ago. There's a  
7 similar problem with Spruce Systems Inc.

8 THE COURT: Can you talk to Ms. Rainer and just tell  
9 her what the problem is so that she can check it? If there's  
10 an improper defendant in there, I would like to get him out  
11 or get it out. I just want to clean this up so that if we  
12 have a lawsuit, we know what the lawsuit is, and I'm trying  
13 to work with you to do that. But I do ask that -- I mean, if  
14 the defendant is claiming that one the defendants that you  
15 sued has nothing to do with anything, listen and research it  
16 before you draw up the next complaint. Okay?

17 MS. RAINER: Absolutely, your Honor. I've asked  
18 numerous times for defense counsel to try to even negotiate  
19 and talk, and that has been lacking. I appreciate that  
20 perhaps you will encourage this open communication.

21 THE COURT: Mr. Rasch, on this piece I do, because I  
22 suspect that there's no problem with diversity jurisdiction,  
23 and for us to spin our wheels over this, I can make her plead  
24 it, and I will make her plead, but why do we have to go over  
25 this over and over again, if in fact nine of the ten, or

1 whatever, she is correct, there are no New York citizens, and  
2 the tenth you don't know about?

3 MR. RASCH: Judge, if I may address that last  
4 comment very briefly.

5 The only reaching out to me Ms. Rainer has done is  
6 wanting to discuss settlement, and the Court --

7 THE COURT: I understand.

8 MR. RASCH: Your Honor, just very, very briefly.  
9 It's really important. I think there's a missimpression  
10 created by her statement. She has not reached out to me and  
11 said, hey, I can't find out who these entities are, or what  
12 does this entity have to do with your client. What she has  
13 reached out for is a settlement meeting, and the Court needs  
14 to understand the way this was done, there was something like  
15 20-something, the parties sued asking for a billion dollars  
16 in what we think are many frivolous claims against  
17 frivolously asserted defendants. My client found out about  
18 this through the Reuters News Service. We think, your Honor,  
19 this was nothing more than a shake down designed to create a  
20 sensationalist story, then now we damaged you in the  
21 marketplace by putting this billion dollar lawsuit on the  
22 internet, we want to settle. Our client is not going to  
23 respond to those tactics.

24 THE COURT: Whatever.

25 MS. RAINER: Your Honor, if I may make one quick

1 statement. I know your time is very precious, and what I'm  
2 saying is, defense counsel is not familiar with this  
3 industry. I personally attended one of the Ambit --

4 THE COURT: I'm sorry, I'm not involved in this, if  
5 people are not ready to settle.

6 MS. RAINER: I want to defend myself from --

7 THE COURT: You don't have to defend yourself  
8 because I'm not accepting as true anything anyone is saying,  
9 okay. You need not defend yourself. All I'm trying to do is  
10 get through the stage of having a complaint that will  
11 actually start a lawsuit, that's all I'm trying to do here.

12 So I am suggesting that, and it sounds like  
13 Mr. Rasch is perfectly willing to discuss it with you. If he  
14 has specific defendants that have nothing to do with this  
15 case that you have named, he will tell you about it. I would  
16 assume, though, based on the facts of what I haven't heard,  
17 that as to the defendants that have something to do with the  
18 case, even if in your view there are no causes of action, you  
19 don't know of any members who are New York citizens; is that  
20 right?

21 MR. RASCH: Your Honor, I just can't answer that  
22 question at this point because I don't have full information  
23 on all of these entities, because some of these entities are  
24 not related to our client.

25 THE COURT: Well, the non-related entities ought to

1 get worked out, okay. Once they are worked out, as far as  
2 I'm concerned, and particularly absent any information from  
3 you, if there are members of relevant defendants who are New  
4 York citizens, I would be satisfied if it is true, and if it  
5 has been researched, that a statement in a complaint that on  
6 information and belief, if this is the case, I don't know, it  
7 is what I understood your letter to be saying, that all of  
8 the defendants have a sole member and that Jere Johnson is a  
9 citizen of Texas.

10 MR. RASCH: And, your Honor, just briefly on that  
11 point. We actually encountered this exact issue in another  
12 case and we don't think that's sufficient to allege on  
13 information and belief. We think there's clear case  
14 authority on that and we will explain that to the Court at  
15 the appropriate time. The case already says --.

16 THE COURT: You know, I really feel you are getting  
17 hung up in the wrong place. I realize -- are you  
18 representing all of the defendants in this case?

19 MR. RASCH: Your Honor, we have sent out a letter  
20 setting forth the defendants that we do represent, as well as  
21 I think we dropped a footnote saying the ones we couldn't  
22 confirm.

23 THE COURT: Okay. As to the defendants that you do  
24 represent, are you in a position to say whether or not any of  
25 the members are New York citizens? I mean, I feel like we

1 are just playing a game at this point.

2 MR. RASCH: Well, your Honor, I think from our  
3 perspective when you look at the way this complaint has been  
4 set up with all of these parties, to thrust the burden on us  
5 --

6 THE COURT: I'm not thrusting the burden on you.  
7 I'm requiring her to clean it up.

8 MR. RASCH: Sure.

9 THE COURT: But I'm really beginning to wonder  
10 whether or not, you know, once we get passed the legalities,  
11 some of this is in good faith from your perspective --

12 MR. RASCH: Well, your Honor --

13 THE COURT: -- as to who you represent.

14 MR. RASCH: Well, your Honor, what I would suggest  
15 is that I don't think that there is any good faith basis for  
16 Ms. Rainer to be alleging that there's any contractual  
17 relationship between her client and any entities other than  
18 Ambit Energy, L.P.

19 THE COURT: I have no idea. That's a legal issue.  
20 I'm not sure how to decide it. It hasn't even been in your  
21 letters. But I am -- I know that you will, and I'm asking  
22 Ms. Rainer to discuss with you who the real defendants or  
23 defendant should be in this case and what the relationship  
24 is.

25 Now, you can't speak to the relationship of

1 defendants you don't know anything about; but as to the  
2 defendants who are your client, you could certainly talk to  
3 her about that, and she can confirm whether or not what you  
4 are saying is true.

5 MR. RASCH: Your Honor, I'm happy to have a  
6 conversation about who the proper defendants have been. I  
7 think given the history of this case, I think the Court can  
8 realize why we have concerns about the way this has been set  
9 up and all of these defendants --.

10 THE COURT: Well, I have some concerns, too, but,  
11 frankly, I would like to get it clarified at this point in  
12 time. I don't want any continued obfuscation. So if you  
13 would talk to her and answer her questions, then maybe she  
14 will be in a position to be satisfied that Ambit Energy is  
15 the only defendant. I don't know.

16 MR. RASCH: Judge, I'm happy to talk to her about  
17 that. The only thing I told her that we are not interested  
18 in discussing her claim that she wants to settle --.

19 THE COURT: Okay, that's fine. I would assume that  
20 discussions of settlement would come sometime after we have a  
21 pleading. We don't have a pleading yet, okay, and that's up  
22 to you. I mean, if you make it past me and there's an  
23 existing complaint - which won't shock me - you will go  
24 before the magistrate, and you will start your discovery, and  
25 you will make a decision as to when, if ever, it is time to

1 talk about settlement.

2 MR. RASCH: Sure. Thank you, your Honor.

3 THE COURT: Right now I need a pleading or we don't  
4 have a case in my court, that's why I want you to talk to  
5 each other about the appropriate defendants, without turning  
6 this into a "gottcha", but have the plaintiff to adequately  
7 plead diversity, okay.

8 MR. RASCH: I'm happy to do that. I think the  
9 starting point from the plaintiff's standpoint is really  
10 identifying who she claims her client had any kind of  
11 contract with, because from what I have seen, there's no good  
12 factual basis to say a consultant had any authority to bind  
13 any of these 14 defendants.

14 THE COURT: I really don't know. I understand your  
15 argument. She's made a further statement relating to the  
16 fact that the consultant that she spoke with also had an even  
17 higher consultant with actual authority to bind either the  
18 defendant or the defendants. That's what she said. I don't  
19 know if it is true.

20 MR. RASCH: But, your Honor, I think from the  
21 pleading standpoint, there would have to be a pleading --  
22 there couldn't be just a conclusory pleading that that  
23 person's authority --

24 THE COURT: We ultimately want to know who she has a  
25 contract with as part of the pleading.



1           MR. RASCH: Right. For example, your Honor, there's  
2 an allegation that Jerry Thompson and Chris Chambless  
3 personally breached this agreement.

4           THE COURT: Well, we need to go through some of  
5 these things. This just has to be cleaned up, and I knew it  
6 was going to take some time to do this. This is the second  
7 time I'm going it. I will not do it again. I don't see any  
8 reason why we can't go through all of these things and talk  
9 about them. At least she will know -- Ms. Rainer will know  
10 what I think she will have to do to clean up her pleading.

11           But, yes, you are right. I mean, we have to know  
12 who she alleges she has a contract with in this pleading.  
13 So, Ms. Rainer those are things you will have to figure out  
14 in advance, okay? So we'll do it one at a time, I mean, that  
15 relate to your contract claim, but I just wanted to get  
16 through diversity jurisdiction first.

17           As I understand it, you are going to talk to the  
18 defendant. You are going to go through whatever further  
19 investigation you need to do, and you will make sure that you  
20 plead in one way or another that all -- there are no members  
21 of any of the defendants who are New York citizens, otherwise  
22 you will not have diversity. Okay?

23           MS. RAINER: I understand, your Honor. Again, I  
24 thank you. As I said, I feel that the other side has been  
25 evasive, confusing.

1 THE COURT: Come on, let's not get into this,  
2 please, please, please. I don't wanted this. You are  
3 wasting my time. I'm trying to help.

4 MS. RAINER: I understand. I appreciate you are  
5 helping.

6 THE COURT: Don't talk about things that are not  
7 relevant to what we are discussing, please.

8 MS. RAINER: I understand.

9 THE COURT: Okay. Turning to the fraud and RICO.

10 MR. RASCH: Your Honor, may I just make one more  
11 point about the contract action, and this goes --

12 THE COURT: I'm perfectly happy to go through the  
13 breach of contract action.

14 MR. RASCH: Let me give the Court an example. In  
15 paragraph four --

16 THE COURT: Wait a second. Let me get the  
17 Complaint.

18 (Pause)

19 Paragraph four doesn't help us very much

20 MR. RASCH: It says, the defendants breached the  
21 agreement by failing to perform its obligations

22 THE COURT: No, I understand. This has all got to  
23 be cleaned up.

24 Wait, wait. I'm talking to Ms. Rainer.

25 MR. RASCH: Sure.

1           THE COURT: Ms. Rainer, we need to know who the  
2 proper defendants are, and we need to know the role played by  
3 each proper defendant. Until we know that, we don't know who  
4 is obligated to perform under your oral contract.

5           Do you understand what I am saying?

6           MS. RAINER: I understand.

7           THE COURT: Paragraph four, I mean, you have got to  
8 completely redo this, okay. In terms of the breach of  
9 contract, the most glaring problem is the one that Mr. Rasch  
10 just alluded to, which we don't know who the defendants  
11 really are,. We don't know who is obligated to do what. So  
12 we don't know who is being charged with the breach of what  
13 obligation, which is what a breach of contract is.

14           Do you see what I'm saying?

15           MS. RAINER: Yes, Your Honor.

16           THE COURT: Now, that to me is the main thing.

17           Do you have any other problem, Mr. Rasch, with the  
18 breach of contract claim?

19           MR. RASCH: Well --

20           THE COURT: She's got to plead a valid contract

21           MR. RASCH: Well, I think, your Honor, there are  
22 three things here

23           The first thing, if it is an oral contract that is  
24 based on her claiming that a consultant -- an independent  
25 consultant of Ambit somehow had the authority to bind the

1 company and enter a contract on behalf of the company

2 THE COURT: Then that should be in a pleading. I  
3 agree with you

4 MR. RASCH: There has to be specific facts and  
5 obligations that would support that theory. I don't think  
6 there are any

7 THE COURT: Ms. Rainer, that's one problem that runs  
8 through this whole thing. In our last conference, you  
9 certainly took my warning that you look at the various causes  
10 of action. I know you are trying to be specific, but you  
11 haven't been specific enough. Something that is just totally  
12 conclusory just won't do it. Okay?

13 MR. RASCH: So, your Honor, that's one issue. It is  
14 just an oral contract.

15 What are the facts that support the idea that some  
16 independent consultant had the ability to -- no indication  
17 who the parties are to the contract. There are conclusory  
18 obligations that the defendants did this and this and that,  
19 and how Spruce Systems, how Greenway Holdings in any way  
20 connected with this, how any individuals could probably have  
21 claimed to be parties to a contract with Ms. Rainer's client.  
22 And there are numerous -- it is not even clear the defendants  
23 Ambit Energy breached the contract.

24 THE COURT: This is something I hope at this point,  
25 Ms. Rainer, you do understand you have got to clean up who

1 the appropriate defendants are, who you know in the breach of  
2 contract claim, which of the defendants in the breach of  
3 contract claim, what are their obligations under the  
4 contract, so that we understand that they breached their  
5 obligations, okay?

6 MS. RAINER: Your Honor, again I appreciate earlier  
7 you said that I do need the assistance of defense counsel  
8 because these companies, these are all intertwined and I am  
9 saying that all of the defendants are Ambit defendants.

10 THE COURT: Well, I mean, we can't do that.

11 MS. RAINER: They are all intertwined, these  
12 companies.

13 THE COURT: Well, I mean, you will have to talk to  
14 defense counsel, and if you need to look into it further --  
15 you can't just say everybody, unless you have a basis to  
16 believe everybody. I mean, when you are talking about a  
17 breach of contract, it is elemental that you need to know who  
18 you got the contract with, because that's the person who has  
19 the obligations under the contract -- that's the entity that  
20 has the obligations under contract. Do you see what I am  
21 saying? So you can't just throw up your hands and say it is  
22 all a mishmash.

23 MR. RASCH: That's really the problem here. I think  
24 the Court raised it the last time. The obligation of a  
25 lawyer under Federal Rules --.

1           THE COURT: I don't want it to hear that. Let's  
2       restrain ourselves as much as we can.

3           MR. RASCH: From our standpoint, Judge - I know you  
4       asked us to confer - but from our standpoint, we think the  
5       only relationship here is between Ms. Gubin's client or  
6       clients and Ambit Energy L.P. we don't think any of these  
7       other entities --.

8           THE COURT: Well, you may well be able to convince  
9       her of that. Maybe that's the contractual relationship.  
10      Maybe some other entity defrauded her. I have no idea.

11          MR. RASCH: Judge, it is the plaintiff's obligation  
12      to investigate, not to just throw the spaghetti against the  
13      wall.

14          THE COURT: She did investigate. She went and got  
15      all of these things, and I really -- there's some spaghetti  
16      against the wall, but there's no reason in the world, if it's  
17      clear to you that Ambit is the only proper defendant, that  
18      you should explain that to her and why, let her look it up  
19      and she will plead what she pleads, and we'll see what  
20      happens, but this is her last pleading.

21          MR. RASCH: Judge, I guess the problem I'm having in  
22      terms of explaining it is that it is like explaining a  
23      negative. I don't understand what the legal theory is. To  
24      claim that there's a contract with anybody other than Ambit  
25      Energy L.P. -- I know there's a relationship between Ms.

1 Gubin and Ambit Energy, because Ambit Energy L.P. pays her  
2 under a consult and arrangement. I understand that. I don't  
3 know where this is coming from to allege any of these other  
4 parties, any of them, have an oral, written or any other kind  
5 of contract with her. So it is a little bit hard for me to  
6 offer more of an explanation, other than just saying I have  
7 no idea where you are coming from.

8 THE COURT: Okay. Let me ask you this, Ms. Rainer,  
9 where did you get all of these entities?

10 MS. RAINER: Your Honor, I did some research about  
11 Ambit, and when I saw all of these companies were  
12 interconnected to Ambit, and all of them --.

13 THE COURT: When you say interconnected, exactly  
14 what relationship are you talking about?

15 MS. RAINER: Well, again, I don't have it in front  
16 of me. I actually had a whole chart as to this. That, for  
17 example, the holding company is above Ambit Energy, and I had  
18 actually charted it all out.

19 THE COURT: The fact that a company has a  
20 relationship with another company doesn't mean that the  
21 second company contracted with your client.

22 Do you understand that?

23 MS. RAINER: I understand, but they all worked  
24 together to defraud my client.

25 THE COURT: Wait, wait. We don't know any of that,

1    either.  If you knew that, you can plead it.  But if all you  
2    know is that you looked them up and you saw that they are  
3    interconnected, see what you can do.  If you discovered  
4    during discovery that there's another defendant who ought to  
5    be a defendant in this case, then you can amend your  
6    complaint to add the other defendant.  Then you will have a  
7    real basis for doing that.

8           MS. RAINER:  Your Honor, for example, Ambit Energy  
9    Holdings LLC provides the energy, parent company of Ambit  
10   Texas, LLC provides what is on the web page.  It is all  
11   interconnected, that's what I keep saying.  It is the nature  
12   of this industry.  What I wanted to emphasize is that I don't  
13   like the fact that defense counsel is acting in bad faith.  I  
14   actually have been at one of these meetings and people who  
15   join these are told that the income level they can make is up  
16   to infinity.  This is what is said at these meetings.  
17   Therefore, the fact that my lawsuit stated a large amount, I  
18   think offended --

19           THE COURT:  I'm not talking about what amounts you  
20   put down, that's your problem.  We have pleading problems  
21   right now.  I really don't want to talk about anything other  
22   than a pleading problem, because now we have been talking for  
23   thirty minutes and we only addressed one of the 15 things I  
24   want to address, and I have a lot of other things to do  
25   today.



1           MR. RASCH: The court just now hit on the precise  
2 problem. It seems like what is happening here, what Ms.  
3 Rainer has done on the internet and any entity that has any  
4 affiliation, okay, with Ambit Energy L.P., she's just  
5 throwing them in the lawsuit. If we are going to talk about  
6 Ambit Energy affiliates, there are probably 50 or 100  
7 affiliates. The fact that they may be a subsidiary  
8 affiliate, that does not create a cause of action against the  
9 affiliated entity, and that's the fundamental problem we are  
10 having.

11           THE COURT: That is the problem, and that's what I'm  
12 saying to Ms. Rainer. Just the fact that somebody is  
13 affiliated does not make them ipso facto a defendant in a  
14 lawsuit. You have to go through each cause of action and  
15 decide whether or not a particular entity is an appropriate  
16 defendant in that cause of action. You have to do that one  
17 at a time. We are just with the first one. We are with the  
18 breach of contract action. I don't see, based on breach of  
19 contract, how you can sue anyone with respect to whom your  
20 client did not have a contract.

21           Do you understand?

22           MS. RAINER: Yes, I understand, your Honor.

23           THE COURT: Okay.

24           Now, let me say, I think, assuming that she pleads a  
25 breach of contract - and Ms. Rainer knows what she has to do

1 for, quantum meruit, it is okay to sue under either. She can  
2 plead a quantum meruit. She can't do both, but she can so.  
3 And by the time you get to your quantum meruit, you will know  
4 who the right defendants are, et cetera, and who it was  
5 actually that you are alleging that accepted benefits for the  
6 services performed by your client, and that your client could  
7 reasonably expect a payment from that entity because your  
8 client actually did supply that entity with a benefit.

9 Do you understand?

10 MS. RAINER: Yes, Your Honor.

11 THE COURT: Think of defendants' one cause of action  
12 at a time.

13 Let me just briefly talk about the fraud action  
14 before the RICO action, because one of the main problems in  
15 the RICO action is I have some doubts, based upon your  
16 allegations, that you going to be able to prove fraud. And  
17 if you can't prove the fraud, because your claim of  
18 fraudulent misrepresentation or fraudulent conduct seems to  
19 be nothing but restatements of what you were going to tell me  
20 your obligations under the a contract, if that's the case,  
21 you won't have any fraud action. So you know what the  
22 elements are.

23 There are several problems that I see. Most of your  
24 allegations seem to relate to a failure to reimburse you  
25 fairly under the contract, or a failure of good faith to do

1 what you are supposed to do under the contract. None of  
2 those claims will make out a fraud claim.

3 There are other claims -- wait for a second. There  
4 are other claims that say things like, well, they represented  
5 they had the most competitive rates. I think if you look at  
6 it, that's going to fall into a category known as "puffing,"  
7 which is not -- statements with respect to which it cannot be  
8 expected that anyone would reasonably rely, because you have  
9 to prove reliance, right?

10 MS. RAINER: Yes.

11 THE COURT: As an element of fraud. So what you  
12 have to do is be very specific about what statements were  
13 made, identify the statement. And because 9(b) is a required  
14 means of pleading, when you are talking about a fraud claim,  
15 you are going to have to be specific about that. What were  
16 the misrepresentations? Who made them? You are going to  
17 have to plead reasonable reliance on the misrepresentations,  
18 and then you are going to have to prove exactly how they  
19 caused you injury. Now, that's just going through the  
20 elements.

21 The problems that I'm seeing with things that you  
22 are saying as misrepresentations - isn't a whole category of  
23 them - are what I would imagine would be contractual  
24 obligations, that will not give you a fraud claim. And  
25 simply saying in the complaint that there was a breach of a

1 legal duty extraneous to the contract does not tell anyone  
2 what in the world you are talking about, because you haven't  
3 said what is the duty and how it is extraneous to the  
4 contract. So we need to know what the contract is for the  
5 contract claim, and we need to know what falls under the  
6 fraud claim is plainly extraneous to the contract.

7           You also have to know that before you write this  
8 claim, you are going to have to research the issue of  
9 reliance. You know, saying, for example, we are a company of  
10 integrity, we'll insure genuine savings over someone else,  
11 strikes me as plainly puffing. If you have a representation  
12 that they guaranteed me reimbursement, that's a contract  
13 issue. That's not a fraud issue.

14           We have the most competitive rates, that's puffing.

15           I must admit, I can't understand from your complaint  
16 - and I read it a number of times - what slamming is, and how  
17 it hurts your client. Maybe you can explain that to me now.  
18 I mean, are you talking -- what is the injury to your client  
19 from slamming?

20           MS. RAINER: The injury to my client from slamming  
21 is that it is being allowed to -- the way Ambit permits the  
22 consultant to put these customers under their own level and  
23 thereby my client is not being paid on her level.

24           THE COURT: Is the slamming, whatever it is,  
25 directly depriving your client of customers?

1 MS. RAINER: Well, I see my issue, because on the  
2 one hand slamming it shouldn't be done because it is illegal,  
3 but it is also depriving my client of legitimately getting  
4 customers.

5 THE COURT: Is this customers your client can't get  
6 or customers who were taken away from your client?

7 MS. RAINER: These were clients that would be taken  
8 away, that lost opportunity.

9 THE COURT: No, no, lost opportunity is different  
10 from stealing an existing customer, and that's my question.

11 MS. RAINER: No, no, this is not stealing an  
12 existing customer.

13 THE COURT: It is lost opportunity?

14 MS. RAINER: Lost opportunity. To get this customer  
15 in, you are slamming them and changing things on your own.

16 THE COURT: Well, that answers a question for me as  
17 to whether or not that has anything to do with RICO, and  
18 we'll get to that in a second. But do you understand in  
19 general about my concerns about your fraud claim and what you  
20 have to do?

21 MS. RAINER: I understand. My only thing, what I  
22 wanted to add on the fraud claim, I'm looking at the  
23 complaint, has both a consultant employee and the customer.

24 THE COURT: I understand, but I really have trouble  
25 understanding -- you know, you keep saying that, but you have

1 to show how it is meaningful. In other words, you have to  
2 show specifically what the representation was to your client,  
3 you know, the knowing falsehood, the intent to defraud, the  
4 reliance, and exactly what injury your client suffered as a  
5 result of that particular representation.

6 Do you see what I'm saying?

7 MS. RAINER: Yes, Your Honor. I will try to clarify  
8 that further in the next complaint.

9 THE COURT: The next is the last, though. Okay?

10 MS. RAINER: I hope so, too.

11 THE COURT: Not I hope so. This is an  
12 understanding, which is grounding this endless phone  
13 conversation and my analysis of your complaint, and this was  
14 an understanding that you confirmed at the beginning of this  
15 discussion. I have no desire to do all of this for you, if  
16 you are just going to come back and say, why don't you check  
17 this one out now.

18 MS. RAINER: I didn't mean it that way. I'm saying  
19 I'm hopeful I can satisfy because I'm doing as much work as I  
20 can.

21 THE COURT: I know you are trying. There's no doubt  
22 in my mind that you are trying. But all I'm saying is this  
23 is your last pleading. It will be put to the test by a  
24 motion by the defendants, if there's a motion to be brought,  
25 and when we are done, if you didn't plead certain causes of

1 action, they are gone with prejudice.

2 Do you understand?

3 MS. RAINER: Yes, I understand.

4 MR. RASCH: Judge, if I may briefly speak to the  
5 fraud claim. We got the same problem here that we had with  
6 the breach of contract. The cases interpreting Rule 9(b)  
7 specifically require that you --.

8 THE COURT: Who, where, when, all of that.

9 MR. RASCH: And it has to be that as to each one of  
10 the 14 defendants. You can't just --

11 THE COURT: Absolutely.

12 MR. RASCH: -- you can't generically say --

13 THE COURT: Absolutely --

14 MR. RASCH: -- that Defendants did this or the  
15 defendants did that.

16 THE COURT: I think we already made that point. We  
17 are now talking about fraud. So when we are talking about  
18 fraud - I'm talking to Ms. Rainer - you are only going to sue  
19 in the fraud claim the defendants who are responsible for  
20 making fraudulent misrepresentations, and then you are going  
21 to tell us under 9(b) the contents of the communication, who  
22 was involved in making the communication, when the  
23 communication, where the communication, how the communication  
24 was fraudulent.

25 Do you understand?

1 MS. RAINER: Yes, your Honor.

2 THE COURT: Particularly the fraud. Any fraud claim  
3 has got to be very, very specific. Okay?

4 MS. RAINER: Yes.

5 THE COURT: Read 9(b).

6 MS. RAINER: The only problem that I foresee is that  
7 this happens on a daily, weekly, monthly basis.

8 THE COURT: Well, then, saying every single week in  
9 a newsletter entitled Block from the corporation, there is a  
10 representation that says A, B.

11 Two, that particular representation is false. You  
12 know, the particular defendants responsible for the  
13 representation, the responsible defendants, I mean, just  
14 based on a straight fraud, are just going to be whoever it  
15 was that made the representation. If it is an employee of a  
16 corporation, and presumably the statement was made by a  
17 corporate employee on behalf of the corporation, then that's  
18 the particular corporation or LLC, or whatever, that you are  
19 suing on that fraud claim. If someone else, if another  
20 entity committed a different fraud, then you will sue that  
21 entity. But each cause of action is specific to any  
22 defendant. All right?

23 MS. RAINER: Yes, Your Honor. I understand.

24 THE COURT: Okay.

25 MR. RASCH: Judge, just briefly by way of example to



1 show the flaws that I think can't be fixed, if these are in  
2 fact really claims.

3           The Court brought up the slamming. Well, without  
4 knowing any specifics, of course I can't verify whether these  
5 allegations of clamming are base or not. Ms. Rainer  
6 apparently doesn't represent the person that was supposedly  
7 slammed, right. So there is no claim there because she  
8 doesn't represent the person who was slammed. And, as I  
9 understand it, she is claiming if someone was slammed - if  
10 that ever occurred - that removes one person from the  
11 universe of people that could conceivably be recruited by her  
12 client.

13           The question I put to her, that I think is just what  
14 you are saying, is, she has to plead what injury was caused  
15 to her client. I know in the RICO context that that is too  
16 indirect. I'm not sure in the fraud context. So I will not  
17 tell her she can't do it.

18           MR. RASCH: Well, presently the Rule 9(b) case, I  
19 think the law is clear, you can't have that sort of rank  
20 speculation as forming the basis for a fraud claim, and you  
21 certainly can't throw spaghetti against the wall suing 14  
22 people.

23           THE COURT: We have been through this. She knows  
24 her fraud claim has to be specific to any particular  
25 defendant she names as a defendant in her fraud claim, okay.

1           Let me say, it may be something that you may look  
2 into, Ms. Rainer, because the slamming plainly is not going  
3 to work with RICO, because there's a direct causation  
4 requirement. Plaintiff's injury must be directly caused by  
5 the RICO violation, and if you are saying that slamming  
6 created the injury, then that's not going to be direct. You  
7 can do that research and make sure I'm right. I'm not saying  
8 I'm right about anything, but I'm trying to give you some  
9 guidance about what to look into.

10           I think there's a good chance Mr. Rasch is right,  
11 you will have the same problem with fraud. It is just too  
12 diluted to say that if a defendant slams with respect to a  
13 customer, so that the customer goes to somebody else, but  
14 that wasn't your customer, that may not be enough to allege  
15 injury to your client under a fraud theory.

16           MS. RAINER: The injury occurs when Ambit allows  
17 this customer to be put under a different level or  
18 transferred to other individuals, thereby removing it from  
19 the multilevel networking --.

20           THE COURT: Wait, let me just say --

21           MS. RAINER: Removing the customers, that's where  
22 Ambit comes in. They are removing these customers from my  
23 client's pyramid and putting them to somebody else.

24           THE COURT: Well, you just told me that no one took  
25 clients -- no one took customers away from your client. They

1 simply did things with customers, so they were not available  
2 to customers to your client.

3 MS. RAINER: That's two parts. One is the slamming,  
4 and the second part of the fraud is the fact that customers  
5 -- another consultant is able to transfer to another  
6 consultant, thereby removing these customers from my client  
7 fraudulently, because these are the clients --.

8 THE COURT: Okay. Let me just explain. I will not  
9 go through it with you, but you are going to have to really  
10 clearly explain how your client is directly injured by  
11 slamming - which I don't begin to understand - by clearly  
12 explaining what slamming is, and being very precise about the  
13 injury to your client from it.

14 Do you understand what I'm saying?

15 MS. RAINER: I understand. I just wanted to clarify  
16 that it is not just the slamming. It is also that there's a  
17 transfer of customers on the different pay levels of this  
18 pyramid.

19 THE COURT: Well, you may well be able to plead that  
20 there are customers that are part of your client's line in  
21 the pyramid, as a result of which your client is getting  
22 compensation from Ambit, who are taking away from your  
23 client's line and given to someone else.

24 Now, I don't know if this is a fraud or not, because  
25 I don't know what the representation is and I don't know what

1 the reliance is. I mean, in a way maybe this is even a  
2 breach of contract because --

3 MR. RASCH: That's the other problem I'm having.  
4 Even if any of this were true - which based on what I know I  
5 don't believe it is - and even if there was some kind of  
6 tangential harm - which I still don't see - none of this  
7 would be a fraud claim, because it doesn't meet the elements  
8 of a fraud claim under state law.

9 THE COURT: Well, I think, Ms. Rainer, you  
10 understand what we are saying here. In other words, if  
11 somebody is impairing compensation due you under the  
12 contract, that is a breach of contract. So if the slamming  
13 turns out to be that with respect to your client, then that's  
14 a contract claim, not a fraud claim.

15 MS. RAINER: Yes, Your Honor.

16 THE COURT: I don't know. You figure it out.

17 MS. RAINER: Right. I will further talk to my  
18 client and try to make it as specific as possible. And, of  
19 course, your Honor, if it doesn't apply, I will remove it.

20 THE COURT: I know that. I know that. I'm  
21 confident that you will. So we talked about fraud.

22 As to RICO, you have to deal with the entire fraud  
23 thing first. Because you are going to have to rely on -- you  
24 have to plead specifically two predicate acts under RICO. I  
25 understand you are talking in general about wire and mail

1 fraud. You will undoubtedly be able to plead two mails or  
2 more, or hundreds, or two transmissions or more, or hundreds,  
3 but you have to proceed them. Okay?

4 MS. RAINER: I understand.

5 THE COURT: Now, again, you have to get through  
6 essentially the whole issue of how something is fraudulent in  
7 order to develop the existence of a fraudulent scheme.

8 Do you understand?

9 MS. RAINER: Yes, your Honor.

10 THE COURT: We've talked about the fact the problems  
11 relating to that. The two biggest problems that I see with  
12 RICO for you are finding an underlying fraud that really is a  
13 fraud, and being able to plead that the fraud that you found  
14 directly caused injury to your client. There are -- I mean,  
15 RICO has a lot of layers, and I know you know that, and the  
16 most basic level there has to be substantive RICO violations  
17 under 1962, and the mail and wire fraud statute would do  
18 that, if you could plead them, an injury to business or  
19 property and direct causation. The injury must be caused  
20 directly by the particular RICO violation. Do you see what  
21 I'm saying? It can't be indirect.

22 MS. RAINER: Yes, Your Honor.

23 THE COURT: So that's why I said if slamming did  
24 anything fraudulently, it is hard to imagine that you will be  
25 able to prove or you will be able to allege the direct

1 causation. But that's something you will have to do.

2 MS. RAINER: I understand, your Honor. And I will  
3 explain to my client that if at this stage we may have to  
4 persist as a cause of action, however to further discover.

5 THE COURT: If through discovery you have a cause of  
6 action you can put in, you can put it in. I don't think you  
7 have a statute of limitations problem, do you?

8 MS. RAINER: I will work my best to find out  
9 everything and to research every incident and every event,  
10 but I will also talk to my client. Perhaps that may be one  
11 of the causes of action now to remove.

12 THE COURT: That may very well be because you may  
13 discover during discovery you have the claim, and if that's  
14 the case, I will permit an amendment.

15 MS. RAINER: I appreciate that, your Honor.

16 THE COURT: Okay. So we talked about contract,  
17 breach of contract, quantum meruit, fraud, and RICO.

18 Let's move on to defamation. The major problem here  
19 is -- well, okay. One of the problems with defamation is the  
20 same with every cause of action. We don't know who the  
21 defendants are with respect to defamation. So you have to be  
22 specific as to the defendant, because in defamation you have  
23 to be specific as to precisely what has been alleged to be  
24 defamatory. The only thing that I saw in here were  
25 allegations that it was said about your client that she

1 didn't adhere to company policies and procedures and that  
2 your client said that she should be avoided.

3 Now, I'm not sure what is defamatory about a claim,  
4 you know, that she didn't adhere to procedures.

5 MS. RAINER: Well, they basically were accusing her  
6 of going to some competitor that her brother named. Her  
7 brother, who is Joseph -- some man by Joe who is related to  
8 her household was part of some competitive company and that  
9 kind of caused a domino effect in Ambit, and also information  
10 that was passed on that she is some kind of, you know, a  
11 trader and she should be dealt with.

12 THE COURT: Well, if you have specific allegations  
13 of bad things that were said about your client and what you  
14 are relying on, put them in your complaint.

15 MS. RAINER: I will, your Honor.

16 THE COURT: And tell us where you got them.

17 MS. RAINER: I wanted to know not that Ambit itself  
18 later took them away, they shutdown her website with this  
19 claim, and a few days later they reopened it because they had  
20 no justifications.

21 THE COURT: Well, we are not here to persuade me  
22 that we have a case or not a case. My only purpose now is to  
23 tell you things that you ought to look at when you do your  
24 absolutely final repleading. Okay?

25 MS. RAINER: Yes, Your Honor.

1 THE COURT: So look at specifically what is alleged  
2 to be defamatory, specifically who did it, more about to whom  
3 it was published. Statements like plaintiff should be  
4 avoided are not statements of fact. They are statements of  
5 opinion. So go to the law of defamation and make sure when  
6 you pick and choose the defamatory statements, you are  
7 picking and choosing statements that are not statements of  
8 opinion, but rather statements of fact. Okay?

9 MS. RAINER: I will. Okay.

10 MR. RASCH: If I may speak briefly?

11 The other possibility here, part of the allegation,  
12 as I understand it, is she's complaining that the concerns  
13 about her client being affiliated with a competitor. To the  
14 extent those were expressed internally at the company as part  
15 of the investigation of her misconduct, that carries a  
16 qualified privileged.

17 THE COURT: I understand.

18 Ms. Rainer, I don't know if it -- it sounds like it  
19 may well as a matter of fact. That's not anything that I can  
20 adjudicate now. You should think, Ms. Rainer, to yourself,  
21 is it internal in the company such that it does -- I mean, I  
22 don't know how -- you will find out who it got published to  
23 with respect to whom there was no privilege.

24 MR. RASCH: Judge, what I'm looking at specifically  
25 is paragraph 46 in the complaint. In the fourth line it



1 says: The defendant is liable to plaintiff. Defamation was  
2 expressed in written form here in communications to Ambit  
3 leadership consultant customers.

4 THE COURT: I'm sorry, this is where?

5 MR. RASCH: Paragraph 46, your Honor, she  
6 specifically alleges that --

7 THE COURT: Hold on. Let me just find it.

8 MR. RASCH: Okay. Go ahead.

9 MR. RASCH: Paragraph 46, your Honor, the fourth  
10 line, she specifically alleges that the liable was in part at  
11 least communicating to Ambit leadership and consultant.  
12 Well, those communications would carry a qualified privilege.

13 THE COURT: Yes, you have to be very careful, Ms.  
14 Rainer, because if you make clear in your complaint that it  
15 went to someone internal in Ambit, or to a consultant, if you  
16 make clear that what you are talking about is privileged,  
17 then the claim goes, even before you get to discovery. So  
18 make sure that you have a good argument that the statement  
19 claimed to be defamatory is not privileged.

20 Do you understand?

21 MS. RAINER: Yes, Your Honor.

22 THE COURT: Because otherwise on the face of the  
23 complaint I would have to get rid of it.

24 MR. RASCH: Judge, another other issue here, of  
25 course with the defamation claim, you have to either allege

1 that it was defamation per se --

2 THE COURT: Or causing special harm.

3 MR. RASCH: Special harm, and that's not alleged  
4 here either, your Honor.

5 THE COURT: Let's not get general; let's get  
6 specific.

7 All right. Ms. Rainer, you do have to plead either  
8 special harm or slander per se. If you can't plead slander  
9 per se - I don't know if you can or you can't - you go to the  
10 book and read what it is about. Then you have to establish  
11 special harm, and you go to the book and find out what that  
12 is about, otherwise it goes just as a matter of pleading.  
13 Okay?

14 MS. RAINER: Yes, Your Honor.

15 THE COURT: Okay. So we need a lot more  
16 specificity.

17 Title VII, you seem not to understand what a right  
18 to sue letter is. That doesn't mean that the EEOC has said  
19 anything other than you have exhausted your EEOC remedies,  
20 that's all it means. It doesn't mean that you have a case.  
21 It doesn't mean that you ought to do anything. It simply  
22 says you don't have to come to the EEOC anymore, you can go  
23 to the district court because we are not going to decide this  
24 case, okay. And if you think I'm wrong, I invite you to read  
25 more about that so that you understand what I'm talking

1 about.

2           You put into your draft claims of religious  
3 discrimination and sexual discrimination, Title VII-type  
4 claims, along with the ADA, the Genetic Information  
5 Non-disclosure Act and the Equal Pay Act. There's nothing in  
6 your complaint about any of those, and the fact that there  
7 were boxes that were checked in the letter from the EEOC,  
8 does not mean that you have stated any cause of action with  
9 respect to any of those things. I strongly suggest that  
10 unless you really have an ADA claim, because your client has  
11 a disability and you can do all of the pleading under that  
12 act, or whatever the Genetic Information Act is or the Equal  
13 Pay Act, just take it out.

14           MS. RAINER: I understand.

15           THE COURT: Turning to the Federal Trade Commission  
16 Act. Why is it in the next draft? Did you suddenly find a  
17 private cause of action?

18           It is at paragraph 17.

19           MS. RAINER: I put that under --.

20           THE COURT: No, fraud is fraud. Just sticking a  
21 statute under your fraud claim that doesn't have a private  
22 cause of action, I don't know what you are doing with it.

23           What is it there for?

24           MS. RAINER: I believe I put it in there was to talk  
25 about violation, showing that the fraud and deception are all

1 intertwined.

2 THE COURT: No, forget the word "intertwined," and  
3 don't intertwine anything in your head. Tease it out, okay.  
4 Be specific. Nothing is mushed together. Everything is  
5 specifically enumerated, okay. And don't put in statutes  
6 that don't have a private cause of action, it doesn't help  
7 that I can see.

8 MS. RAINER: Okay, your Honor.

9 THE COURT: Okay. It may well be, but I don't know  
10 the answer to the question. But if you have put down  
11 everything that you have to say about why your client, an  
12 employee and not an independent contractor, so that we can  
13 address this issue on this motion, then the defendant can  
14 just address it on this motion. Okay?

15 MS. RAINER: Yes, Your Honor. I did want to mention  
16 why I emphasize the EEOC. It was my understanding when EEOC  
17 issued the right to sue letter, it was not only that they had  
18 finished their investigation --.

19 THE COURT: No, no. What they are telling you is  
20 they are not going to do an investigation, so you don't have  
21 to stay there anymore. Just look it up, okay.

22 MS. RAINER: What I wanted to say is that my clients  
23 went, and what they explained to me the EEOC said to them  
24 that they do qualify for EEOC protection because of the way  
25 that they are paid, the way residuals are paid, the way

1 payments are made to infiniti.

2 THE COURT: That's a legal issue, and that's an  
3 issue I will have to decide based on the allegations.

4 MS. RAINER: That's why I'm relying --

5 THE COURT: You can't do that. You can't do that,  
6 because what somebody at the EEOC told your client is  
7 completely irrelevant to my decision on whether or not the  
8 defendants can knock out your Title VII claims because you  
9 cannot plead, and you have not pled that she is an employee.  
10 And the fact that the EEOC person said something to your  
11 client is not relevant to that

12 MS. RAINER: No, I understand. I thought it was my  
13 understanding, and when the EEOC gave that letter, they did  
14 qualify her that she would be as an employee, as opposed to  
15 them saying --

16 THE COURT: I'm sorry, Ms. Rainer, just don't say it  
17 again because I'm telling you that won't work and I don't  
18 want to talk about it anymore. If you want to plead it that  
19 way, fine, but you will go down the tubes.

20 As to damages, you can't plead damages -- not just  
21 the amounts, we are not going to even talk about the amounts  
22 at this point. We are going to talk about your allegations  
23 as to damages. You say you are entitled to liquidated  
24 damages because it is difficult to determine damages. Well,  
25 the whole point about liquidated damages is that they are

1 liquidated in advance and contained in an agreement that if  
2 there is a breach, this will be the liquidated damages. You  
3 don't have that, so I don't see where you get any liquidated  
4 damages from.

5 As to any punitive damages you have to allege, it's  
6 got to be clear with respect to any particular -- there are  
7 some causes of action which, if they survive, could give rise  
8 to punitive damages, but there are others which could not.  
9 Your breach of contract will never give rise to punitive  
10 damages, and your quantum meruit will never give rise to  
11 punitive damages. So you have to look at each cause of  
12 action and make a determination as to whether or not there is  
13 anything you are seeking or can seek as to attorney's fees.  
14 I mean, I'm not even going to begin to tackle that one  
15 because attorney's fees -- I mean, ultimately you need to  
16 come out of a successful cause of action. You don't  
17 automatically get attorney's fees, and it would have to be  
18 very -- I'm not even suggesting you can just ask for  
19 attorney's fees now that's enough and it will sort itself  
20 out, because there's so much else you have to do, okay.

21 Now, I think that's all I have to say.

22 Let me ask Mr. Rasch, is there anything I missed?

23 MR. RASCH: Well, Judge, as you probably are aware,  
24 I can go on for another hour about our concerns about this  
25 complaint. I think the Court touched on the highlights. I

1 think towards the end, these punitive damages, liquidated  
2 damages, attorney's fees are linked.

3 THE COURT: They are not separate causes of action,  
4 to begin with. You understand that, don't you, Ms. Rainer?

5 MS. RAINER: Yes.

6 THE COURT: Okay. All they are is a part of my X  
7 claim. For example, were you able to state a RICO claim,  
8 which I don't think you can, and maybe one of those you might  
9 want to hold off on, but you can ask for treble damages, were  
10 you able to state an exacerbated fraud claim, you can ask for  
11 punitive damages. But these are not individual causes of  
12 action. They are the types of damages that are available  
13 under particular claims that are actually successfully pled,  
14 okay. So there's really no point in putting a cause of  
15 action in there that asks for attorney's fees; it is just not  
16 helpful. Okay?

17 MS. RAINER: Yes, Your Honor.

18 THE COURT: Okay.

19 Now, again, like last time, I will -- I want to give  
20 you as much time as you need to get it right. I really mean  
21 it this time, I will not do it again. I will just decide it,  
22 and if I dismiss it, it will not be with leave to amend. It  
23 will be dismissed. Okay?

24 MS. RAINER: Yes, your Honor.

25 THE COURT: So take as much time as you need.

1           Would you like to give me some sense of how long  
2           that is going to be?

3           MS. RAINER: I would like at least a month, if  
4           possible.

5           THE COURT: That's fine, it certainly is. I would  
6           rather give you more time and you do it right.

7           MS. RAINER: Right, only because I must admit once  
8           my kids are in school, I have more flexibility. Between  
9           vacations, it's been very difficult this summer. If it is  
10          possible --

11          THE COURT: You can have as much time as you want.  
12          Is one month enough?

13          MS. RAINER: I think it would be enough. My only  
14          problem is they have commenced an arbitration against my  
15          client in Texas.

16          THE COURT: See, I can't help you with that.

17          MS. RAINER: I don't know if there's a stay that --

18          THE COURT: I can't help you with that.

19          MS. RAINER: I understand. I understand. I'm just  
20          having a problem with that, and if we can have some kind of  
21          communication with the other side to stay or delay that until  
22          we have this.

23          THE COURT: That would have to be some sort of  
24          agreement with the other side or some ruling by the  
25          arbitrator in Texas. I have nothing to do with that.



1           MR. RASCH: We have no intention to staying the  
2 arbitration. We think at the end of the day we think this is  
3 at most some kind of vanilla minor contract dispute under  
4 which there's an arbitration. We think all of this was done  
5 for an improper purpose, the billion dollar claim.

6           THE COURT: You will not agree, so I think that's  
7 the answer to the question. You are not going to get the  
8 defendants to agree to stay the arbitration. If there's any  
9 other way to figure out to stay the arbitration, go ahead and  
10 try. You can't do it through me.

11           MS. RAINER: What I wanted to say, in that  
12 arbitration, their claim - I will not quote it - basically  
13 they are not liable in this case, that's why we filed an  
14 arbitration. So at this stage it is frivolous actually to --

15           THE COURT: I'm sorry, you bring any argument you  
16 have to the arbitrator, not to me. Okay?

17           MS. RAINER: I understand, your Honor. May I have  
18 until September 30th?

19           THE COURT: Yes. Okay.

20           You know, this time I don't even think pre-motion  
21 letters are necessary. Why don't you just take that as the  
22 complaint.

23           MR. RASCH: Sure, your Honor.

24           THE COURT: Okay. And if there is going to be a  
25 motion to the new complaint - and understand that I'm going

1 to read it as liberally as I can, notwithstanding everything  
2 that I said -- I mean, everything I said has to be done. If  
3 it seems to you like it is all there, please don't let us do  
4 another motion. Okay?

5 MR. RASCH: I hear the Court. I will say based on  
6 the facts that I know, I can't see how a factual claim can be  
7 pled.

8 THE COURT: Maybe that's true. I'm not telling you  
9 you can't bring your motion. I'm saying I know you will only  
10 do it if you feel confident in it.

11 MR. RASCH: Unless there's something I'm not aware  
12 of now, I do anticipate we'll file a motion to dismiss, but  
13 we'll look at it very carefully.

14 THE COURT: If you are going to do that, work on the  
15 briefing scheduling and send to me the agreed upon briefing  
16 schedule.

17 MR. RASCH: Absolutely, your Honor.

18 THE COURT: Okay. Have a good day.

19 MS. RAINER: Thank you very much, your Honor.

20 MR. RASCH: Thank you. Good-bye.

21 THE COURT: Good-bye.

22 (The proceedings are concluded.)  
23  
24  
25